90-1257

No. __-____

Supreme Court, U.S.
FILED
FEB 6 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1990

IVAN C. CLEVELAND,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE COURT OF APPEALS, DIVISION ONE

JAMES E. LOBSENZ
Counsel of Record
CARNEY, STEPHENSON, BADLEY,
SMITH & SPELLMAN, P.S.
2300 Columbia Center
701 Fifth Avenue
Seattle, Washington 98104
(206) 622-8020
Counsel for Petitioners

January 31, 1991

ABCD Legal Printers, Seattle, WA

QUESTIONS PRESENTED

1. Is it contrary to requirements of fair procedure guaranteed by the Due Process Clause of the Fourteenth Amendment to permit the State to relitigate an issue in a criminal prosecution which it previously litigated and lost in a civil case?

2. May a State constitutionally single out criminal defendants as the only class of litigants to whom the benefits of the collateral estoppel doctrine are denied?

3. Does it violate the guarantee of due process of law to be tried and convicted by a jury of a criminal offense when a judge has already ruled in a prior civil case that the State failed to prove the commission of the same alleged criminal offense?

PARTIES TO THE PROCEEDINGS

Petitioner, the defendant/appellant below, is Ivan C. Cleveland. The respondent, plaintiff below, is the State of Washington.

TABLE OF CONTENTS

Page

Questions Presented i

Parties To The Proceedings ii

Opinions Below 1

Jurisdiction 2

Constitutional Provision Involved 2

Statement Of The Case 2

How The Issue Was Decided Below 3

Reasons Why Writ Should Be Granted 6

Conclusion 17

Appendices:

Appendix A. Opinion Dated July 30, 1990. Court of Appeals, State of Washington, Division One A-1

Appendix B. Order Denying Petition For Review Dated December 4, 1990 ..... B-1

TABLE OF AUTHORITIES

Cases	Page
Ashe v. Swenson, 397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 (1970)	8-10,12,13,14
Beagles v. Seattle First National Bank, 25 Wn. App. 925, 929, 610 P.2d 962 (1980)	4
Benton v. Maryland, 395 U.S. 784 (1969)	8,9
Green v. United States, 355 U.S. 184, 190, 2 L. Ed.2d 199, 78 S. Ct. 221, 61 ALR 2d 1119 (1957)	13,15
Harris v. Washington, 404 U.S. 55, 30 L.Ed.2d 212, 92 S.Ct. 183 (1971)	4,5
Hoag v. New Jersey, 356 U.S. 464, 2 L.Ed.2d 913, 78 S.Ct. 829, *rehearing denied* 357 U.S. 933, 2 L.Ed.2d 1375, 78 S.Ct. 1366 (1958)	3,6,7-8,17
Lockwood v. Superior Court, 160 Cal. App.3d 667, 206 Cal. Rptr. 785 (1984)	6,12
Palko v. Connecticut, 302 U.S. 319, 82 L.Ed. 288, 58 S.Ct. 149 (1937)	8
Standefer v. United States, 447 U.S. 10, 64 L.Ed. 2d 689, 100 S. Ct. 1999 (1980)	15,16,17
State v. Cleveland, 58 Wn. App. 634, 794 P.2d 546 (1990)	1,4,5,6,15

TABLE OF AUTHORITIES, continued

Cases *(cont.)* *Page*

United States v. Oppenheimer, 242 U.S. 85, 61 L. Ed. 161, 37 S. Ct. 68, 3 ALR 516. 12

Yates v. United States, 354 U.S. 298, 1 L.Ed.2d 1356, 77 S.Ct. 1064 (1957) 10,11,17

Statutes

RCW 71.06 12

28 U.S.C. Section 1257 (3) 2

Constitutional Provisions

U.S. Constitution, 14th Amendment 2

IN THE

Supreme Court of the United States

October Term, 1990

IVAN C. CLEVELAND,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE COURT OF APPEALS, DIVISION ONE

Ivan C. Cleveland petitions for a writ of certiorari to review the judgment of the Washington State Court of Appeals, Division One, in this case.

OPINIONS BELOW

On direct appeal the Washington State Court of Appeals, Division One, affirmed petitioner's convictions in an opinion filed on July 30, 1990. *State v. Cleveland*, 58 Wn. App. 634, 794 P.2d 546 (1990). This opinion appears as Appendix A to this petition.

Petitioner unsuccessfully sought review in the Washington State Supreme Court. That Court denied his petition for review on December 4, 1990. A copy of the order denying review appears as Appendix B to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

On May 3, 1985 the State of Washington filed a dependency petition in the Juvenile Department of the Snohomish County Superior Court in Everett, Washington, alleging that Ivan C. Cleveland had sexually molested his stepdaughter. A bench trial was held before the Honorable Gerald Knight on June 11, 1985 and July 23, 1985, to determine the truth of the accusation. On July 23, 1985 Judge Knight found that the State of Washington had failed to prove, by a preponderance of the evidence, that Cleveland had sexually abused his stepdaughter. Judge Knight entered a judgment dismissing the dependency petition.

Notwithstanding the dismissal of the dependency petition, the State of Washington proceeded to charge, try, and convict Mr. Cleveland of two sexual offenses in a separate criminal prosecution. The criminal case was also tried in Snohomish County Superior Court, but it was tried to a jury, before the Honorable John Rutter. In a pretrial motion, Cleveland moved for dismissal of the criminal charges on the ground that the judgment in the dependency case collaterally estopped the State of Washington from retrying the same allegations of sexual abuse. That motion was denied by the Honorable Paul Hansen.

After the jury returned a verdict of guilty and prior to sentencing, Cleveland filed a motion to arrest judgment, again arguing that given the prior trial and judgment in the dependency case, the State was collaterally estopped from prosecuting him criminally. Cleveland argued that this result was compelled by both the Double Jeopardy Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. This motion was denied, and Cleveland was sentenced to prison.

Cleveland appealed his convictions to Division One of the Washington State Court of Appeals. The Court of Appeals affirmed his conviction, rejecting Cleveland's contention that the State of Washington was collaterally estopped from prosecuting him criminally.

HOW THE ISSUE WAS DECIDED BELOW

Cleveland argued that the issue reserved in *Hoag v. New Jersey*, 356 U.S. 464, 2 L.Ed.2d 913, 78 S.Ct. 829, *rehearing denied* 357 U.S. 933, 2 L.Ed.2d 1375, 78 S.Ct. 1366 (1958) was ripe for decision in his case. The Washington State Court of Appeals, however, did not address the due process issue. Instead, the court below held that as a matter of state law, the fourth requirement of the collateral estoppel doctrine had not been met, because application of the doctrine would contradict public policy.

Under Washington state law, the requirements for application of the collateral estoppel doctrine are as follows:

> (1) the issue decided in the prior adjudication must be identical with one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and (4) the application of the doctrine must not work an injustice.

Beagles v. Seattle First National Bank, 25 Wn. App. 925, 929, 610 P.2d 962 (1980), quoted in *State v. Cleveland*, 58 Wn. App. at 639.

The court below admitted that the first three requirements had been met:

> It is undisputed that the issue resolved in Cleveland's favor in the dependency hearing was identical to the issue on which he was convicted in the criminal proceeding. That issue was sexual abuse of his stepdaughter K. There is also no question but that the dependency proceeding ended in a final judgment on the merits. The party against whom the plea of collateral estoppel is asserted is the State of Washington in both cases. It is immaterial that in the dependency proceeding the State was represented by the Attorney General and in the criminal prosecution was represented by the county prosecuting attorney. [Citation omitted].

State v. Cleveland, 58 Wn. App. at 639-640.

The Court of Appeals concluded, however, that the last requirement, that application of the collateral estoppel doctrine would not work an injustice, had not been met. Cleveland argued below that application of the collateral estoppel doctrine was constitutionally required by the Fourteenth Amendment due process clause. In support of his argument, Cleveland relied upon this Court's decision in *Harris v. Washington*, 404 U.S. 55, 30 L.Ed.2d 212, 92 S.Ct. 183 (1971).

In *Harris* the Washington State Supreme Court permitted a second criminal trial for the murder of a second victim after the defendant had been acquitted at an earlier trial of being the person responsible for the letter bomb which killed the first victim. The Washington State Supreme Court allowed the second trial and refused to apply the doctrine of collateral estoppel, reasoning that the erroneous exclusion of evidence at the first trial meant that the issues in the first trial had

not been "fully litigated." This Court reversed holding that neither the availability of additional evidence at the second trial, nor the good faith of the prosecution, was a constitutionally permissible justification for relitigating the exact same issue[1] (whether defendant Harris was the person who mailed the letter bomb which killed two persons and injured a third). This Court held that the collateral estoppel component of the Double Jeopardy Clause of the Fifth Amendment had been violated.

In the present case, the Washington State Court of Appeals rejected the analogy to *Harris* and held as follows:

> We do not believe that the United States Supreme Court's decision in *Harris v. Washington, supra*, necessarily means that courts cannot decide to reject the application of the doctrine of collateral estoppel for policy reasons in all cases. Rather we believe that the *Harris* Court held that the mere failure to fully litigate, without something more, is insufficient to reject application of collateral estoppel on policy grounds.

Cleveland, 58 Wn. App. at 642.

The Washington State Court of Appeals concluded that "overall considerations of public policy are determinative of the question before us." *Id.* at 653.

> Dependency proceedings are often attended with a sense of urgency, are held as promptly as reasonably possible, and the entire focus of the proceedings is the welfare of the child. The focus being more narrow than in a typical felony trial, the State normally does not need, nor does

[1] "The State concedes that the ultimate issue of identity was decided by the jury in the first trial. That being so, the constitutional guarantee applies, irrespective of whether the jury considered all relevant evidence, and irrespective of the good faith of the State in bringing successive prosecutions." *Harris v. Washington*, 404 U.S. at 57.

it perform, the extensive preparation typically required for felony trials.

Cleveland, 58 Wn. App. at 644.

The Washington State Court of Appeals acknowledged that its decision was in conflict with the decision of the California Court of Appeals in *Lockwood v. Superior Court*, 160 Cal. App.3d 667, 206 Cal. Rptr. 785 (1984). *Lockwood* also involved an allegation of child abuse first raised and litigated in a dependency proceeding. The California Court of Appeals held that the dependency proceeding determination that abuse had not been proved collaterally estopped the State of California from criminally prosecuting the parent for the same alleged act of abuse. The Washington State Court of Appeals declined to follow *Lockwood*.

REASONS WHY WRIT SHOULD BE GRANTED

Petitioner Cleveland raises the issue that this Court expressly reserved and declined to decide in *Hoag v. New Jersey*, 356 U.S. 464, 2 L.Ed.2d 913, 78 S.Ct. 829 (1958). In *Hoag* the defendant was criminally charged with three counts of robbery for robbing three men at a tavern in Fairview, New Jersey. Two other men were also robbed at the same time in the same tavern, but the indictment only alleged three counts of robbery. Hoag presented an alibi defense and claimed that he was not the person who committed the robbery. A jury acquitted Hoag of all three charges. New Jersey then obtained a new indictment charging Hoag with another count of robbery, alleging that a fourth man named Yager was also present at the tavern, and had also been robbed. At the second trial Hoag again presented an alibi defense. This time, however, he was convicted.

Hoag contended that his conviction violated due process. In his view, "[T]he doctrine of collateral estoppel . . . is grounded

in considerations of basic fairness to the litigants, and thus for a State to decline to apply the rule in favor of a criminal defendant deprives him of due process." *Hoag*, 356 U.S. at 570. This Court noted the policy considerations behind the doctrine of collateral estoppel:

> A common statement of the role of collateral estoppel is that "where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action." Restatement, Judgments, Section 68(1). As an aspect of the broader doctrine of res judicata, collateral estoppel is designed to eliminate the expense, vexation, waste, and possible inconsistent results of duplicatory litigation. [Citation omitted]. Although the rule was originally developed in connection with civil litigation, it has been widely employed in criminal cases in both state and federal courts. [Citations omitted].

Hoag, 356 U.S. at 470-71.

The issue was not decided, however, because this Court concluded that there was no way of knowing whether the jury which acquitted Hoag at the first trial based its acquittal upon a determination that Hoag was not the person who committed the robbery, or whether it was based upon some other ground.

> Despite its wide employment, we entertain grave doubts whether collateral estoppel can be regarded as a constitutional requirement. Certainly this Court has never so held. However, we need not decide that question, for in this case New Jersey both recognized the rule of collateral estoppel and considered its application to the facts of this case. The state court simply ruled that petitioner's previous acquittal did not give rise to such an estoppel because "the trial of the first three indictments involved several questions, not just [petitioner's] identity, and there is no way of knowing upon which question the jury's verdict turned."

Hoag, 356 U.S. at 471.

Three justices dissented in *Hoag*, arguing that the record did establish that the acquittal in the first trial was clearly based solely upon a determination that it had not been proved that Hoag was the robber. The dissenters then went on to address the merits of the issue raised by Hoag, which the majority did not address.

Chief Justice Warren concluded that the second trial violated the due process clause of the Fourteenth Amendment.[2] Justices Black and Douglas agreed that Hoag's conviction was unconstitutional, but instead of finding the second trial barred by the procedural due process requirements of the Fourteenth Amendment, they found the trial violated the Double Jeopardy Clause of the Fifth Amendment. They further acknowledged that since the Double Jeopardy Clause had not been deemed binding upon the States, they believed the decision in *Palko v. Connecticut*, 302 U.S. 319, 82 L.Ed. 288, 58 S.Ct. 149 (1937) should be overruled, and that the Court should hold that the Double Jeopardy Clause *was* binding upon the States.

Eleven years later, in *Benton v. Maryland*, 395 U.S. 784 (1969) this Court did overrule *Palko v. Connecticut*, and held that the Double Jeopardy Clause of the Fifth Amendment *was* binding upon the States. The following year, in *Ashe v. Swenson*, 397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 (1970) this Court held that the Double Jeopardy Clause *did* include a collateral estoppel component. This Court's discussion of *Hoag* in *Ashe* traces the historical development of a constitutional collateral estoppel doctrine that was grounded in the Fifth Amendment Double Jeopardy Clause, rather than in the Fourteenth Amendment Due Process Clause:

> As the District Court and the Court of Appeals correctly noted, the operating facts here are virtually identical to those of *Hoag v. New Jersey*.

---

[2] "I think the undisputed facts disclosed by this record plainly show that the conviction of this petitioner has been obtained by use of a procedure inconsistent with the due process requirements of the Fourteenth Amendment." 356 U.S. at 473.

> In that case, the defendant was tried for the armed robbery of three men who, along with others, had been held up in a tavern. The proof of the robbery was clear, but the evidence identifying the defendant as one of the robbers was weak, and the defendant interposed an alibi defense. The jury brought in a verdict of not guilty. The defendant was then brought to trial again, on an indictment charging the robbery of a fourth victim of the tavern holdup. This time the jury found him guilty. After appeals in the state court proved unsuccessful, Hoag brought his case here.
>
> *Viewing the question presented solely in terms of Fourteenth Amendment due process — whether the course that New Jersey had pursued had "led to fundamental unfairness,"* 356 U.S., at 467 — this Court declined to reverse the judgment of conviction, because "in the circumstances shown by this record, we cannot say that petitioner's later prosecution and conviction violated due process." 356 U.S. at 466 . . . And in the view the Court took of the issues presented, it did not, of course, even approach consideration of whether collateral estoppel is an ingredient of the Fifth Amendment guarantee against double jeopardy.
>
> The doctrine of *Benton v. Maryland*, 395 U.S. 784, puts the issues in the present case in a perspective quite different from that in which the issues were perceived in *Hoag v. New Jersey, supra. The question is no longer whether or not collateral estoppel is a requirement of due process,* but whether it is a part of the Fifth Amendment guarantee against double jeopardy. And if collateral estoppel is embodied in that guarantee, then *its applicability is no longer a matter to be left for state court determination within the broad bounds of fundamental fairness,* but a matter of constitutional fact we must decide through an examination of the entire record.

Ashe v. Swenson, 397 U.S. at 442-443 (emphasis added).

In *Ashe* this Court proceeded to hold that collateral estoppel *was* a component of the Double Jeopardy Clause, and concluded that the second trial in *Ashe* was constitutionally forbidden by the acquittal in the first trial.

The case at bar presents the procedural due process issue that was not resolved in *Hoag*, and which has never been resolved since. In *Ashe* this Court determined that the Fifth Amendment Double Jeopardy Clause requires application of collateral estoppel in cases where there are successive criminal prosecutions and the same issues are being tried in both cases. But this Court has never resolved whether collateral estoppel is constitutionally required by the Due Process Clause of the Fourteenth Amendment in cases where the same issues are tried, first in a civil case where the litigant is not in "jeopardy," and then retried in a criminal case where the litigant is in jeopardy.

Petitioner submits that this unresolved Fourteenth Amendment due process issue is one of substantial public interest and constitutional significance. This Court's decision in *Yates v. United States*, 354 U.S. 298, 1 L.Ed.2d 1356, 77 S.Ct. 1064 (1957) provides support for petitioner's claim that application of the collateral estoppel doctrine is required even when the first trial was civil and the second trial was criminal. In *Yates* petitioner Schneiderman was indicted for a violation of the Smith Act for conspiring to advocate the overthrow of the Government of the United States by the organization of the Communist Party. Schneiderman claimed that the criminal prosecution was barred by the doctrine of collateral estoppel because of a prior denaturalization proceeding brought against him by the United States in which he was the prevailing party. The United States contended that the doctrine of collateral estoppel did not apply when the prior proceeding was civil and the second proceeding was criminal.

This Court, however, agreed with Schneiderman that held that the collateral estoppel doctrine did apply when a fact was determined in a civil proceeding and the same fact was at issue in a subsequent criminal proceeding:

> We are in agreement with petitioner that *the doctrine of collateral estoppel is not made inapplicable by the fact that this is a criminal case, whereas the prior proceedings were civil in character.* We agree further that the nonexistence of a fact may be established by a judgment no less than its existence; that, in other words, a party may be precluded under the doctrine of collateral estoppel from attempting a second time to provide a fact that he sought unsuccessfully to prove in a prior action.

Yates, 354 U.S. at 336 (emphasis added).[3]

In *Yates* there was no need for this Court to decide whether, in a subsequent criminal case, the application of the collateral estoppel doctrine to a prior civil judgment, was constitutionally required by the due process clause. The case at bar, however, presents that issue. This Court's precedents establish that the collateral estoppel doctrine component of the Fifth Amendment Double Jeopardy Clause is one of the bedrock principles of fair procedure which characterizes our adversary system of criminal justice.

> Collateral estoppel is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the

[3] The *Yates* Court went on to hold that the prior denaturalization proceeding merely determined that prior to 1927 Schneiderman had not adopted an interpretation of the Communist Party's teachings which called for violent action. Since the criminal indictment alleged criminal advocacy during the years 1948-1951, the prior civil action did not determine the same facts which were at issue in the criminal case, and therefore there was no collateral estoppel bar. However, Schneiderman, and all the other criminal defendants, did win a reversal of his conviction on other grounds.

> same parties in any future lawsuit. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than fifty years ago in *United States v. Oppenheimer*, 242 U.S. 85, 61 L. Ed. 161, 37 S. Ct. 68, 3 ALR 516. As Mr. Justice Holmes put the matter in that case, "It cannot be that the safeguards of the person, so often and rightly mentioned with solemn reverence, are less than those that protect from liability in debt.

Ashe v. Swenson, 297 U.S. at 443, citing *Oppenheimer*, 242 U.S. at 87.

Thus the *Ashe* and *Oppenheimer* decisions recognize that the protections of the collateral estoppel doctrine cannot rationally be made available to civil litigants, and yet simultaneously withheld from accused persons in criminal proceedings. And yet that is precisely what transpired in this case. In direct contravention of the *Ashe/Oppenheimer* principle of equal application of collateral estoppel in civil and criminal contexts, the Washington State Court of Appeals has singled out defendants in criminal cases as the only group of litigants who *cannot* enjoy the protections of the collateral estoppel doctrine. Washington State's treatment of criminal defendants is at odds with California's treatment of the same class of persons. Had Cleveland lived in California, under *Lockwood v. Superior Court*, 160 Cal. App. 3d 667, 206 Cal. Rptr. 785 (1984) the final judgment in the dependency proceeding would have collaterally estopped the State from prosecuting him criminally.

Moreover, if the State of Washington tried to follow a dependency proceeding at which an allegation of sexual molestation was not proved with a civil proceeding to revoke a professional license to practice medicine or law or psychology, then under Washington State law the State *would* be precluded from relitigating the issue of sexual abuse. If, in the case at bar, the State had attempted to follow the dependency proceeding with a civil commitment proceeding designed to commit Cleveland as a sexual psychopath pursuant to RCW 71.06,

then, under the holding of the state Court of Appeals in this case, the collateral estoppel doctrine *would* apply, because the State would be following one civil proceeding with a second civil proceeding. The determination in the juvenile dependency case by Judge Knight that Cleveland did not sexually abuse his stepdaughter would collaterally estop the State from seeking to civilly commit Cleveland as a sexual psychopath based on the same alle, ation of sexual abuse of his stepdaughter. But merely because Cleveland was prosecuted criminally, rather than civilly, and thus because his imprisonment is pursuant to a criminal judgment rather than a civil judgment, the Washington State Court of Appeals has determined that the collateral estoppel doctrine does not apply. This type of reasoning contradicts Justice Holmes' pronouncement that the protections of the collateral estoppel doctrine cannot be extended to debtors in civil cases while being withheld from accused persons in criminal cases.

The decision below also conflicts with this Court's decisions which recognize that the collateral estoppel doctrine protects accused persons from the abuse of successive prosecutions which allow the State to refine its case to wear down the defendant by repeatedly forcing him to defend against the same allegations. In *Ashe* this Court noted that the "extraordinary proliferation of overlapping and related statutory offenses" had dramatically increased "the potential for unfair and abusive reprosecutions." "The federal courts soon recognized the need to prevent such abuses through the doctrine of collateral estoppel, and it became a safeguard firmly embedded in federal law." *Ashe*, 397 U.S. at 445, n.10. The *Ashe* decision recognized that "whatever else" the Double Jeopardy Clause may guarantee, "it surely protects a man who has been acquitted from having to 'run the gauntlet' a second time." *Id.* at 446, citing to *Green v. United States*, 355 U.S. 184, 190, 2 L. Ed.2d 199, 78 S. Ct. 221, 61 ALR 2d 1119 (1957).

The present case demonstrates that the same dangers of abusive relitigation arise when the first trial is denominated as "civil" and the second as "criminal" in nature. The primary difference between the civil dependency trial and the criminal trial was the testimony of the State's so-called expert witness, Barbara Huffman, at the criminal trial. Without Huffman the State was unable to convince a seasoned trial judge by a preponderance of the evidence that Cleveland had sexually abused his stepdaughter. With Huffman's testimony the State was able to convince twelve jurors beyond a reasonable doubt that Cleveland had sexually abused his stepdaughter. The lesson the State learned from the civil dependency trial was that it needed something more in order to carry its burden of proof. Thus the State used its experience in the dependency trial to refine and hone its case, so that it would not lose the second trial.

This is precisely the type of conduct which was condemned in *Ashe* where this Court noted that the State of Missouri had used the first trial as a means of preparing for a second trial:

> In this case the State in its brief has frankly conceded that following the petitioner's acquittal, it treated the first trial as no more than a dry run for the second prosecution: "No doubt the prosecutor felt the state had a provable case on the first charge and, when he lost, he did what every good attorney would do — he refined his presentation in light of the turn of events at the first trial." But this is precisely what the constitutional guarantee forbids.

Ashe, 397 U.S. at 447.

The question presented by this case is whether same type of case refinement and relitigation which the Double Jeopardy Clause forbids when the State uses a prior criminal trial to refine its case for a second criminal trial, should somehow be constitutionally permissible when the State uses a prior civil trial to refine its case for a subsequent criminal trial. Petitioner

Cleveland submits that the evil to be prevented is the same[4]; therefore the constitutional result should be the same.

The Washington State Court of Appeals relied upon *Standefer v. United States*, 447 U.S. 10, 64 L.Ed. 2d 689, 100 S. Ct. 1999 (1980) for the broad proposition that the policy considerations behind the doctrine of collateral estoppel are significantly different in the criminal context than they are in the civil context. *Cleveland*, 58 Wn. App. at 643. This is undeniably true as a broad proposition, but it is completely irrelevant in the context of a case where a criminal defendant seeks to have collateral estoppel effect given to a prior *civil* judgment.

The Washington State Court of Appeals notes that in criminal cases "the government is often without a full and fair opportunity to litigate because of discovery limitations, the lack of remedial appellate procedures if a defendant is acquitted, and the exclusionary rule." *Cleveland*, at 643. But the prior civil dependency proceeding is not analogous to the separate criminal trial of defendant Standefer's codefendant. There are no limitations on discovery in the civil dependency case. The State of Washington was free to engage in any and all discovery procedures. The Fourth Amendment exclusionary rule has no application whatsoever to civil dependency cases. And the lack of remedial appellate procedures in the criminal system also has no application in dependency cases, for although the prosecution cannot appeal an acquittal in a criminal case, the State can appeal a judgment of dismissal in a civil dependency case.

---

[4] "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that all its resources and power should not be allowed to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, *as well as enhancing the possibility that even though innocent he may be found guilty.*"

Green v. United States, 355 U.S. at 187-188 (emphasis added).

In *Standefer* this Court noted that in a criminal case a jury may acquit one codefendant in a severed trial despite overwhelming evidence of the codefendant's guilt. The prosecution

> is prohibited from being granted a directed verdict or from obtaining a judgment notwithstanding the verdict no matter how clear the evidence in support of guilt; *cf.* Fed. Rule Civ. Proc. 50; it cannot secure a new trial on the ground that an acquittal was plainly contrary to the weight of the evidence, *cf.* Fed. Rule Civ. Pro. 59 . . .

Standefer, 447 U.S. at 22. This Court noted that juries sometimes acquit "out of compassion or compromise or because of 'their assumption of a power which they have no right to exercise, but to which they were disposed through lenity.' " *Id.* But in this case, the prior trial was a civil trial before a judge. There can be no contention that the dependency trial judge ignored the law and found against the State out of a sense of compassion for someone he thought really was a child molester.

In sum, the policy considerations which underlay this Court's *Standefer* decision not to apply collateral estoppel to the second successive criminal trial of the second codefendant, have no application whatsoever to the factual circumstances of this case. Here, by contrast, we have the awkward and grossly unfair situation in which a jury has convicted a man of a heinous criminal offense despite the finding of a seasoned trial judge that the defendant did not commit the offense. While such inconsistencies may be tolerated in the context of successive jury trials in criminal cases, petitioner submits that they cannot, consistent with the due process clause of the Fourteenth Amendment, be tolerated in cases where a civil bench trial is followed by a criminal jury trial.

In *Standefer* this Court stated:

> This case does no more than manifest the simple if discomforting reality that "different juries may reach different results under any criminal statute. That is one of the consequences we must accept under our jury system." [Citation]. While symmetry of results may be intellectually satisfying, it is not required.

Standefer, 447 U.S. at 25. Petitioner Cleveland submits that while two inconsistent jury verdicts must be tolerated in a criminal system where each of two criminal defendants has a right to a trial by jury, an inconsistency between a jury verdict and a judicial fact finding regarding the same defendant need not and should not be tolerated.

CONCLUSION

This Court should grant review to decide the question which the majority did not reach in *Hoag v. New Jersey*:

> The issue is whether or not this determination of guilt, based as it is on the successive litigation of a single issue that had previously been resolved by a jury in petitioners' favor, is contrary to the requirements of fair procedure guaranteed by the Due Process Clause of the Fourteenth Amendment.

Hoag v. New Jersey, 356 U.S. at 474 (Warren, C.J., dissenting).

In *Yates v. United States*, *supra*, this Court held noted that the federal courts had recognized that the collateral estoppel doctrine was applicable to criminal cases where the prior trial was civil in nature. The case at bar poses the issue of whether the federal common law rule of collateral estoppel is constitutionally required by the Fourteenth Amendment Due Process Clause, and therefore binding upon the States.

Finally, this Court should also grant review to decide whether a State may constitutionally deny the collateral estoppel benefits of a prior civil judgment to criminally accused persons, while granting the same benefits to all other litigants.

Respectfully submitted this 31st day of January, 1991.

JAMES E. LOBSENZ
Counsel of Record
CARNEY, STEPHENSON, BADLEY,
SMITH & SPELLMAN, P.S.
Counsel for Petitioners

APPENDIX A

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION ONE

No. 22863-3-I

STATE OF WASHINGTON,

Respondent,

v.

IVAN C. CLEVELAND,

Appellant,

APPEAL FROM
THE SNOHOMISH COUNTY SUPERIOR COURT

Before: Scholfield, Coleman and Forrest, JJ.

SCHOLFIELD, J.—On June 11 and July 23, 1985, a fact-finding trial was held on a petition for dependency of 8-year-old K., the defendant's stepdaughter. The basis for the claimed dependency was the allegation that defendant, Ivan Cleveland, had sexually abused K., and that Mrs. Cleveland, K.'s mother and Cleveland's wife, would not order Cleveland to live elsewhere. The trial court found that the State had not shown by a preponderance of the evidence that the alleged sexual abuse had occurred and dismissed the petition.

Before the dependency hearing was completed, Cleveland was charged with statutory rape and indecent liberties. Upon dismissal of the dependency petition, Cleveland moved for dismissal of the criminal charges on collateral estoppel grounds, asserting that the criminal charges were based on allegations of sexual abuse of K. that were identical to those allegations heard and dismissed in the dependency proceedings. The trial court denied the motion to dismiss, and Cleveland was convicted by a jury of indecent liberties and attempted statutory rape.

Cleveland appeals, asserting that the prosecution is barred by the doctrine of collateral estoppel, and asserting error in the admission of expert testimony and improper closing argument by the deputy prosecuting attorney. We affirm.

DEPENDENCY FACT-FINDING HEARINGS

At the time of the dependency hearings, RCW 9A.44.120, our child hearsay statute, did not apply to dependency proceedings. At the dependency hearing, K. testified that Cleveland had touched her private spot with his finger and his private part. She described the occasions when this occurred. K. testified she told her mother about it, but her mother did not believe her. K. said she also told a Child Protective Services caseworker, Vickie Springer, and others.

Cleveland testified and flatly denied ever abusing K. in any way. Mrs. Cleveland testifed K. had never reported her

claim of sexual abuse to her. She said K. did not always tell the truth and that she did not believe K.'s accusations. Other witnesses testified, but evidence of K.'s statements to them was excluded as hearsay. The trial court found the evidence insufficient to prove sexual abuse and dismissed the petition. It is undisputed that the dependency petition was based entirely on allegations by K. of sexual abuse by Cleveland.

EVIDENCE AT TRIAL

At trial, K. testified Cleveland had rubbed her "private parts" with his finger. She said he had not touched her bare skin, nor touched her in any other way. She denied any penetration and said she could not recall specific occasions when sexual abuse occurred.

Detective Marsh testified pursuant to the child hearsay statute to statements made to him by K. describing three specific instances of sexual abuse. Several of K.'s school friends, the school nurse, two teachers, the caseworker, and the foster mother all testified to statements made to them by K. reporting sexual abuse by Cleveland.

Barbara Huffman, a family therapist, testified as an expert witness concerning characteristics and typical responses of child victims of sexual abuse.[1] The testimony of Cleveland and Mrs. Cleveland was very similar to their testimony in the dependency hearings.

COLLATERAL ESTOPPEL

Should an issue decided adversely to the State in a dependency hearing estop the State from trying the same issue in a subsequent criminal trial? We proceed on the basis that

---

[1] Huffman's testimony is the subject of a separate assignment of error and will be described in greater detail later in this opinion.

the issue in both cases is the same. Did Cleveland sexually abuse his stepdaughter K.? There was no other basis for the claim of dependency, and the jury obviously answered the question in the affirmative in the criminal trial. Collateral estoppel

> is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than fifty years ago in *United States v. Oppenheimer*, 242 U.S. 85[, 61 L. Ed. 161, 37 S. Ct. 68 (1916)].

Ashe v. Swenson, 397 U.S. 436, 443, 25 L. Ed. 2d 469, 90 S. Ct. 1189 (1970).

In *Yates v. United States*, 354 U.S. 298, 1 L. Ed. 2d 1356, 77 S. Ct. 1064 (1957), the Court stated that collateral estoppel applies to a subsequent criminal prosecution, even if the issue involved was decided in a prior civil action:

> We are in agreement with petitioner that the doctrine of collateral estoppel is not made inapplicable by the fact that this is a criminal case, whereas the prior proceedings were civil in character. *United States v. Oppenheimer*, 242 U.S. 85[, 61 L. Ed. 161, 37 S. Ct. 68 (1916)].

Yates, at 335.

In *Ashe v. Swenson*, *supra*, the United States Supreme Court determined that the constitutional basis for the doctrine of collateral estoppel was embodied in the Fifth Amendment guaranty against double jeopardy. In that case, the Court held that in a multiple victim situation, where a man was acquitted of the robbery of one victim due to insufficiency of identity

evidence, he could not then be prosecuted for the robbery of a different victim. *Ashe*, at 446.

The doctrine of collateral estoppel had long been the rule in federal criminal cases. The effect of *Ashe v. Swenson, supra*, was that the rule was now applicable in state criminal cases, since *Benton v. Maryland*, 395 U.S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056 (1969) had made the double jeopardy clause applicable to the States. In its analysis, the *Ashe* Court noted that it had not previously ruled that collateral estoppel was of constitutional dimensions because in the past there were few situations in which the need might arise, especially since a single course of conduct would more than likely yield only one charge. *Ashe*, at 445 n.10.

The Court went on to allude to the distinction between double jeopardy and collateral estoppel by recognizing that strict application of the concept of double jeopardy would not preclude the State from charging Ashe with six separate offenses, corresponding to the robbery of the six victims. Additionally, if Ashe had been convicted of all six counts, he could have received a total of six sentences for his crimes. However, because the only issue at trial was the identity of the robbers, collateral estoppel precluded the relitigation of that issue once it was decided in the initial trial.

Washington law is in accord. *See Henderson v. Bardahl Int'l Corp.*, 72 Wn.2d 109, 431 P.2d 961 (1967). In *Beagles v. Seattle-First Nat'l Bank*, 25 Wn. App. 925, 929, 610 P.2d 962 (1980), the Court of Appeals stated the requirements for application of the doctrine of collateral estoppel as follows:

> The modern requirements for application of the doctrine are: (1) the issue decided in the prior adjudication must be identical with one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and (4) application of the doctrine must not work an injustice.

[1] Applying the four requirements of collateral estoppel to the facts of the case before us, we conclude that the first three are here satisfied. It is undisputed that the issue resolved in Cleveland's favor in the dependency hearing was identical to the issue on which he was convicted in the criminal proceeding. That issue was sexual abuse of his stepdaughter K. There is also no question but that the dependency proceeding ended in a final judgment on the merits. The party against whom the plea of collateral estoppel is asserted is the State of Washington in both cases. It is immaterial that in the dependency proceeding, the State was represented by the Attorney General and in the criminal prosecution was represented by the county prosecuting attorney. *State v. Dupard*, 93 Wn.2d 268, 609 P.2d 961 (1980).

The last requirement for the application of collateral estoppel is one of public policy: whether the doctrine's application would work an injustice. In *State v. Dupard, supra*, the Supreme Court addressed the issue of whether a determination by the Board of Prison Terms and Paroles that Dupard was not guilty of an offense, which would have constituted a parole violation, estopped the State from prosecuting Dupard for the same alleged offense in a criminal proceeding.

The *Dupard* court held that estoppel did not apply, stating that the doctrine of collateral estoppel can be qualified or rejected when its application would contravene public policy. As a general proposition, the issue of whether a parolee had committed a new and separate offense was "more appropriately addressed to the criminal justice system." *Dupard*, at 276. The court's ultimate conclusion was that practical public policy required that when new criminal matters were charged in the criminal justice system, they must be decided there unhampered by parallel proceedings before the Board of Prison Terms and Paroles. On that basis, collateral estoppel was rejected.

However, in *State v. Harris*, 78 Wn.2d 894, 480 P.2d 484, *rev'd per curiam*, 404 U.S. 55, 30 L. Ed. 2d 212, 92 S. Ct. 183 (1971), the defendant was charged with sending a letter bomb that injured his estranged wife, killed her infant son, and killed her lover. Harris was tried first for the murder of the lover, and certain evidence involving a threatening letter to the wife was excluded based on the marital privilege. Harris was acquitted.

The State then proceeded to prosecute Harris for the death of the child and the assault upon his wife. The threatening letter was apparently admissible in that prosecution. The Washington State Court of Appeals in *State v. Harris*, 2 Wn. App. 272, 469 P.2d 937 (1970), granted Harris' motion for a writ of prohibition. In its opinion, the Court of Appeals stated that:

> because the record demonstrates without question that the retrial of petitioner for assault and murder will require relitigation of the same ultimate fact—(did petitioner mail the package containing the explosive?)—we have the view that collateral estoppel applies to prohibit retrial on that issue.

Harris, 2 Wn. App. at 291-92. The Court of Appeals also noted that the only additional evidence to be introduced at the second trial was the threatening letter. According to the court, that additional evidence was not "directly germane" to the issue of whether Harris mailed the bomb, but would emphasize his motive to commit the crime. *Harris*, at 291.

The State appealed, and the Washington Supreme Court denied the writ of prohibition and affirmed the trial court. In its opinion, the court noted that:

> Without the presence of harassment, constitutional collateral estoppel posits the familiar question of whether an ultimate fact which must be proved in the second case has already been fully litigated in the first trial. There are

> two elements in this question: (1) identity of issues, and (2) completeness of the prior litigation.

(Footnote omitted). *State v. Harris*, 78 Wn.2d at 899.

Although the *State v. Harris, supra*, court acknowledged that there was identity of issue, it held that the issue was not fully contested in the first trial. The opinion stated as follows:

> We are of the opinion that, in cases where evidence is rejected for reasons that have no bearing on the quality of the evidence, the issue on which that evidence bears is not fully litigated. This is to be distinguishd from evidence which is rejected on grounds of its irrelevancy, untrustworthiness, or cumulative nature. In such latter instances, the end determination on the particular issue is as fully litigated as proper administration of justice will allow. But there are other instances where, for some reason of policy, the law does *not* completely litigate an issue. We regard the policy which precludes otherwise relevant and competent evidence in certain instances on the grounds of privilege as such a situation. In such cases, collateral estoppel does not preclude subsequent litigation of the particular issue, since it has not been fully litigated in the first instance.

State v. Harris, 78 Wn.2d at 901.

However, on appeal to the United States Supreme Court, *State v. Harris, supra*, was reversed in a short per curiam opinion. The Court stated as follows:

> In *Ashe v. Swenson*, we held that collateral estoppel in criminal trials is an integral part of the protection against double jeopardy guaranteed by the Fifth and Fourteenth Amendments. We said tht collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." The State concedes that the ultimate issue of identity was decided by the jury in the first

> trial. That being so, the constitutional guarantee applies, *irrespective of whether the jury considered all relevant evidence, and irrespective of the good faith of the State in bringing successive prosecutions.*

(Citations omitted. Italics ours.) *Harris v. Washington*, 404 U.S. 55, 56-57, 30 L. Ed. 2d 212, 92 S. Ct. 183 (1971).

[2] We do not believe that the United States Supreme Court's decision in *Harris v. Washington, supra*, necessarily means that courts cannot decide to reject the application of the doctrine of collateral estoppel for policy reasons in all cases. Rather, we believe that the *Harris* Court held that mere failure to fully litigate, without something more, is insufficient to reject application of collateral estoppel on policy grounds.

In fact, the United States Supreme Court has itself applied policy considerations in refusing to apply collateral estoppel in a criminal context. In *Standefer v. United States*, 447 U.S. 10, 64 L. Ed. 2d 689, 100 S. Ct. 1999 (1980), an accomplice sought dismissal of the prosecution against him after the principal was acquitted. The principal, Niederberger, was an IRS agent accused of accepting compensation from Standefer in the form of payments for vacations taken, in violation of 26 U.S.C. § 7214. The *Standefer* Court refused to apply collateral estoppel to Niederberger's jury acquittals.

The Court noted that the doctrine arose in the context of civil cases, as a way to promote judicial economy and to conserve private resources, without being unfair to the litigant against whom the estoppel is invoked. *Standefer*, at 21. The *Standefer* Court stated that the considerations in the criminal context differ significantly from the civil situation, in that the government is often without a full and fair opportunity to litigate because of discovery limitations, the lack of remedial appellate procedures if a defendant is acquitted, and the exclusionary rule.

In addition, jury verdicts may be the result of passion or prejudice, and as such, without remedial appellate procedures (the State may not appeal an acquittal), collateral estoppel should not apply when the criminal defendant in the first proceeding was not the same defendant seeking the protection of collateral estoppel in the second proceeding. *Standefer*, at 23-24.

It may be a fair question as to whether nonmutual collateral estoppel should be applied to the case before us, given that, as K.'s stepfather, Cleveland was not a party to the dependency proceeding. Because our decision here is based on separate policy considerations, we do not decide that issue. However, we note that the unusual circumstances here differ from those present in *Standefer*, because although Cleveland was not a party to the dependency proceeding, the only issue there concerned Cleveland's conduct—whether he had sexually abused K. Therefore, unlike *Standefer*, which dealt with another party's activities, the case before us concerned only Cleveland in both proceedings.

As noted above, we find overall considerations of public policy are determinative of the question before us. Dependency proceedings are often attended with a sense of urgency, are held as promptly as reasonably possible, and the entire focus of the proceeding is the welfare of the child. The focus being more narrow than in a typical felony trial, the State normally does not need, nor does it perform, the extensive preparation typically required for felony trials.

Furthermore, the prosecutor uses many more resources in developing a felony prosecution than those available and used in the typical dependency hearing. Dependency is decided by a judge, while felony trials are usually tried to a jury. In addition, if the State was faced with application of the doctrine of collateral estoppel to findings in dependency proceedings, there could well be a reluctance to conduct dependency proceedings in cases where one or more of the same issues would

arise in subsequent criminal prosecutions. While the welfare of minor children is undeniably important, we are influenced by the desirability of not impeding enforcement of the criminal law when no overriding consideration requires it.[2]

The trial court did not err in rejecting Cleveland's motion to dismiss based upon the application of the doctrine of collateral estoppel.

TESTIMONY OF BARBARA HUFFMAN

Barbara Huffman is a child and family therapist at Luther Child Center in Everett. Acknowledging there were inconsistencies in K.'s testimony, the State presented expert testimony from Huffman regarding typical behavior of child victims of sexual abuse. This testimony was offered to aid the jury in evaluating the testimony of K. Huffman's work is primarily with sexually abused children. She has a master's degree in education and child development and also a master's degree in social work, and has worked with at least 80 child victims of sexual abuse. She stated these were cases where the abuse had been verified—usually by admission of the offender.

Huffman testified it was not unusual for a child sex abuse victim to be reluctant to tell about it. She based that answer on her own observations and experience and stated some reasons for the testimonial reluctance of children. Huffman said it was common for the abused child not to tell the full story initially and to add or subtract facts as the events were retold. Extensive explanatory reasons for this conduct were also related. While Huffman's testimony was based on her own experience, she testified her experience was consistent with the experience of other experts in the field. The trial court

---

[2] We are aware that *Lockwood v. Superior Court*, 160 Cal. App. 3d 667, 206 Cal. Rptr. 785 (1984) supports Cleveland's position here. We are satisfied, however, that our public policy concerns are sound.

sustained an objection to testimony that recanting of claims of sexual abuse was also not unusual.

Cleveland argues that there was no evidence that characteristics of child victims of sexual abuse is a generally accepted method for determining whether sexual abuse had occurred in a particular case. In making this argument, Cleveland cites *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987). In *Black*, the expert testified in part: "There is a specific profile for rape victims and [the victim] fits in." (Italics omitted.) *Black*, at 339. The basis for this statement was described by the witness as the "rape trauma syndrome." *Black*, at 339.

The issue in *Black* was whether or not the sexual intercourse was consensual. The testimony of the expert amounted to an opinion that, indeed, the intercourse was not consensual and that a rape had occurred. The opinion in *Black* appears to hold that the substance of the expert testimony was an opinion that the defendant was guilty and was inadmissible for that reason. *Black*, at 348. The *Black* opinion also holds that "rape trauma syndrome" is not a scientifically reliable means of proving lack of consent in a rape case.

However, in *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988), the Washington Supreme Court approved the admission in a rape trial of expert testimony on "battered woman syndrome" to assist the jury in understanding the victim's delays in reporting the alleged sexual assaults and for continuing the battering relationship. Although the trial court permitted testimony regarding "battered woman syndrome" for this purpose, the court excluded testimony from the expert to the effect that the alleged victim had been diagnosed as a rape victim. *Ciskie*, at 272.

The *Ciskie* court stated as follows:

> [The expert's opinion was that] the failure of the woman . . . to report the sexual assaults . . . was characteristic of a

> person suffering from the battered woman syndrome. This testimony was helpful to the jury's understanding of a matter outside the competence of an ordinary lay person, and the trial court limited the admission of that testimony to its appropriate purpose.
>
> Although [the expert's] testimony clearly satisfied the requirements of ER 702, the trial court had the discretion under ER 403 to exclude the evidence if he found a danger of unfair prejudice. The trial court properly found that there was danger of such prejudice if [the expert] were to present to the jury a diagnosis of [the victim] as a rape victim, and accordingly barred such testimony.

Ciskie, at 279.

[3] The case sub judice more closely resembles *Ciskie* than *Black*. Huffman's testimony did not espouse a theory proving guilt. In fact, her testimony was really not an explanatory theory or opinion requiring acceptance by the scientific community by ER 702.[3] Huffman's testimony was essentially a description of her personal observations of some of the characteristics of child sex abuse victims. Her observations are comparable to testimony of a physician describing characteristics he has personally observed in his treatment of a particular injury or disease. Huffman did not at any time offer an opinion that K. was a victim of sexual abuse. Nor did she ever say the testimonial deficits she described were limited to child victims of sexual abuse. Huffman did not imply, as Cleveland argues, that Cleveland was guilty of the acts attributed to him by K. Nor did she ever say or imply that K. was telling the truth.

The basis of ER 702, at least in part, is the ruling in *Frye v. United States*, 293 F. 1013, 1014, 34 A.L.R. 145 (D.C. Cir.

---

[3] ER 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

1923), which rejected a "systolic blood pressure deception test" on the ground it had not yet gained recognition by the scientific community. The difference between such scientific testing and an expert testifying to facts based upon her own observations is clear. The court did not err in admitting Huffman's testimony.

PROSECUTORIAL MISCONDUCT

In rebuttal closing argument, the prosecutor argued as follows:

> None of the people who testified here have any interest in trying to create a case of sexual abuse where none exists. Mr. Cleveland was given a chance to present any and all evidence that he felt would help you decide. He has a good defense attorney, and you can bet your bottom dollar that Mr. Jones would not have overlooked any opportunity to present admissible, helpful evidence to you.

Defense counsel objected, but was overruled. Cleveland assigns this ruling as error.

In *State v. Traweek*, 43 Wn. App. 99, 715 P.2d 1148 (1986), the prosecutor commented in closing argument as follows:

> Mr. Traweek doesn't have to take the stand and you can't hold that against him. That doesn't mean the defense counsel can't put other witnesses on if they have explanations for any of these questions, any of this evidence. Where has it been? Why hasn't it be [*sic*] presented if there are explanations, which there aren't? . . .

Traweek, at 106.

The *Traweek* court held that it was error for the prosecutor to comment on the lack of defense evidence because the defendant has no duty to present evidence. Citing *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970), the

Traweek court noted that the State bears the whole burden of proving each element of the case beyond a reasonable doubt. *Traweek*, at 107. According to the *Traweek* court, the prosecutor's statement suggested that the defendant was obliged to call witnesses and prove his innocence, if he could, and for that reason was improper. However, the *Traweek* court found any error to be harmless.

[4, 5] The argument made by the prosecutor in the case before us was not strictly limited to a comment on the State's own evidence. The reference to Cleveland having a good defense attorney who would not overlook any opportunity to present favorable evidence clearly suggests that there is no favorable evidence because Cleveland did not present favorable evidence. The inference from this argument is that Cleveland had a duty to present favorable evidence if it existed. The prosecutor's argument was improper. Counsel's objection should have been sustained, the comment should have been stricken, and the jury admonished to disregard it. Reversal is required unless the error was harmless beyond a reasonable doubt. *State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). The trial court's instructions to the jury stated that the State had the burden of proving each element of the crime beyond a reasonable doubt and that a reasonable doubt could arise from evidence or lack of evidence. The instructions thus made it clear to the jury that it could find that there was a reasonable doubt, even in the absence of defense evidence. *See Traweek*, at 108.

The objectionable argument by the prosecutor has virtually no persuasive quality in the context of the facts of this case. It is common knowledge that sexual molestation of a child is not carried on in the presence of other witnesses. Cleveland testified that he was innocent of the accusations made by his stepdaughter K. The prosecutor's argument can only be interpreted as referring to affirmative evidence that Cleveland might discover and present to the court. Where

would one in Cleveland's position look for such evidence? It appears to us to be extremly unlikely that the jury could have been influenced in any respect by the improper argument made in this case. It is obvious that in order to convict Cleveland, the jury had to believe some or all of K.'s testimony, either through her own testimony at trial or through proof of statements made by K. outside the courtroom but admissible through the child hearsay statute. The portion of the prosecutors' closing argument objected to does not bear upon the credibility of K. We are satisfied that the result in this case would have been the same had the portion of the closing argument objected to not been made. Allowing the closing argument to stand was harmless error beyond a reasonable doubt.

Judgment affirmed.

COLEMAN, C.J., and FORREST, J., concur.

APPENDIX B

SUPREME COURT OF THE STATE OF WASHINGTON

No. 57540-1

STATE OF WASHINGTON,

Respondent,

v.

IVAN C. CLEVELAND,

Appellant.

PETITION FOR REVIEW

This matter came on before Department I of this Court on its December 4, 1990, Motion Calendar on Petition for Review. Department I having considered the Petition and the files herein;

Now, therefore, it is hereby

ORDERED:

That Petition for Review is denied.

DATED at Olympia, Washington this 4th day of December, 1990.

/s/ Keith Callow
Chief Justice

Supreme Court, U.S.
FILED
MAR 6 1991
OFFICE OF THE CLERK

90-1257

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

IVAN C. CLEVELAND,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE WASHINGTON STATE COURT OF APPEALS,
DIVISION I

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

SETH AARON FINE
Counsel of Record for
Respondent
Deputy Prosecuting
Attorney
Snohomish County
Prosecutor's Office
3000 Rockefeller Ave.
Everett, WA 98201
(206) 388-3333

QUESTION PRESENTED

Under the constitutional principle of collateral estoppel, is a criminal defendant entitled to the benefit of findings made in a civil proceeding in which the defendant was not a party?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
STATUTE INVOLVED	4
STATEMENT OF THE CASE	5
SUMMARY OF THE ARGUMENT	8
ARGUMENT	11
CONCLUSION	19

TABLE OF AUTHORITIES

Washington cases	Page
Beagles v. Seattle-First Nat'l. Bank, 25 Wn. App. 925, 610 P.2d 962 (1980)	15
Fahlen v. Mounsey, 46 Wn. App. 45, 728 P.2d 1097 (1986). .	16
State v. Cleveland, 58 Wn. App. 634, 794 P.2d 546 (1990) .	15
State v. Jones, 112 Wn.2d 488, 772 P.2d 496 (1989)	14
Federal cases	
Standefer v. United States, 447 U.S. 10, 64 L.Ed.2d 689, 100 S.Ct. 1999 (1980) . . .	8,9,11, 12,13,19
Other cases	
Lockwood v. Superior Court, 160 Cal App. 3d 667, 206 Cal Rptr. 785 (1984) . . .	10,11,16 17,18
Lucido v. Superior Court, 51 Cal. 3d 335, 272 Cal. Rptr. 767, 795 P.2d 1223 (1990) .	11,17

TABLE OF AUTHORITIES (continued)

Statutes	Page
1982 Wash. Laws, ch. 129, §2 . .	4,5,6
1985 Wash. Laws, ch. 404, §1 . .	6
RCW 9A.44.120	6

STATUTE INVOLVED

At the time of the proceedings in this case, the admissibility of a child's out-of-court statements was governed by the following Washington statute:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of the State of Washington if:
> (1) The court finds, in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
> (2) The child either:
> (a) Testifies at the proceedings; or
> (b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.
> A statement may not be admitted under this section unless the

> proponent of the statement makes known to the adverse party his intent to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

1982 Wash. Laws, ch. 129 § 2.

STATEMENT OF THE CASE

The petitioner, Ivan C. Cleveland, has been convicted of attempted first degree statutory rape and indecent liberties. The victim of these crimes was Kelsey Knight. Kelsey is the adopted daughter of Vicky Cleveland, petitioner's wife. The crimes first came to light when Kelsey reported them to a teacher on April 30, 1985. Kelsey later described the crimes to other people, including police officers, a social worker, and a child therapist.

On May 3, 1985, the State of Washington, acting through the Attorney General's Office, filed a dependency petition on Kelsey's behalf. The petition alleged that Mr. Cleveland had abused Kelsey and that Ms. Cleveland had refused to require him to move out of the home. A hearing on this petition was held on June 11 and July 23, 1985. At the hearing, the Assistant Attorney General stated, without objection, that Mr. Cleveland "officially has no standing before the court."

At the time of the dependency hearing, a child's out-of-court descriptions of sexual abuse were admissible only in criminal

proceedings.[1] 1982 Wash. Laws, ch. 129 §2. As a result, Kelsey's testimony provided the only evidence of the abuse. Evidence concerning her statements was excluded as hearsay. Mr. Cleveland denied any abuse. The judge found the evidence to be "exactly balanced." Accordingly, he determined that the State had not proved the allegations in the dependency petition by a preponderance of the evidence. The petition was therefore dismissed.

Meanwhile, on July 17, 1985, the State, acting through the County

---

1 The text of the statute is set out above. The statute was subsequently amended to allow these statements to be admitted in juvenile dependency proceedings. 1985 Wash. Laws, ch. 404, § 1, codified as Wash. Rev. Code § 9A.44.120.

Prosecutor's Office, filed an information charging Mr. Cleveland with first degree statutory rape. The information was later amended to add a charge of indecent liberties.

Trial began on October 28, 1985. At trial, the State introduced both Kelsey's testimony and evidence of her statements. To explain inconsistencies between the testimony and the statements, an expert witness testified concerning victims' reluctance to disclose abuse. Mr. Cleveland again denied any abuse. On November 1, the jury found him guilty of attempted first degree statutory rape and indecent liberties. Because Mr. Cleveland absconded the jurisdiction,[2]

---

2 He was convicted of bail jumping as a
CONTINUED ON NEXT PAGE

he was not sentenced until September 9, 1988.

SUMMARY OF THE ARGUMENT

The issue presented by the petition is whether non-mutual collateral estoppel will result from findings in civil cases. This court has already held that non-mutual estoppel does not arise from findings in criminal cases. Standefer v. United States, 447 U.S. 10, 64 L.Ed.2d 689, 100 S.Ct. 1999 (1980).

Most of the reasoning of Standefer applies equally here. Standefer states that application of non-mutual estoppel is unwarranted when evidentiary rules prevent the government from presenting

---

CONTINUED FROM PREVIOUS PAGE
result.

all of its proof in the first case. The child's out-of-court statements were a major portion of the State's proof in the criminal case. Under Washington law, these statements were inadmissible at the dependency hearing.

Petitioner claims that this case illustrates how the State can use a civil case to refine and hone its presentation for a criminal case. Contrary to this claim, most of the differences between the dependency proceeding and the criminal proceedings resulted from this difference in the applicable rules of evidence.

Petitioner asserts that Washington is using a different standard for collateral estoppel in criminal cases

than it uses in civil cases. In fact, the standard used here by the Washington Court of Appeals is identical to the standard used by that court in civil cases.

Finally, petitioner claims that the decision here conflicts with the approach taken by California courts. The California Court of Appeals has held that criminal proceedings can be estopped by findings in dependency proceedings. Lockwood v. Superior Court, 160 Cal. App. 3d 667, 206 Cal. Rptr. 785 (1984). Lockwood, however, does not involve non-mutual estoppel. Also, a recent decision of the California Supreme Court casts doubt on the reasoning of Lockwood. Lucido v. Superior Court, 51 Cal. 3d 335,

272 Cal. Rptr. 767, 795 P.2d 1223 (1990).

ARGUMENT

Petitioner is seeking to have findings in civil cases accorded far greater collateral estoppel effect than findings in criminal cases. Had the dependency proceeding been a criminal case, collateral estoppel would clearly not be constitutionally required, because petitioner was not a party to that proceeding. An acquittal of one defendant does not collaterally estop criminal proceedings against another defendant. Standefer v. United States, 447 U.S. 10, 64 L.Ed.2d 689, 100 S.Ct. 1999 (1980).

The court in Standefer gave essentially three reasons for refusing to apply collateral estoppel: (1) The State's inability to obtain review of a verdict that is contrary to the evidence; (2) The possibility that evidence inadmissible against one party could be admissible against another; (3) The important interest in the enforcement of the criminal law. Id. at 22-25. Admittedly, the first reason does not apply to a finding in a civil case.

On the other hand, the second reason fully applies here. The victim's out-of-court statements were a key portion of the State's evidence at the criminal trial. These statements were not admissible at the dependency hearing.

"[W]here evidentiary rules prevent the Government from presenting all its proof in the first case, application of non-mutual estoppel would be plainly unwarranted." Id. at 24.

Of course, the third reason cited in Standefer applies as well--the State has a compelling interest in enforcing its laws against sexual abuse of children. Thus, under the reasoning of Standefer, non-mutual collateral estoppel should not be applied.

Petitioner claims that the State used the dependency trial to "refine and hone its case" for the criminal trial. Contrary to petitioner's claim, the primary difference between the two hearings was not simply the presence of

an expert witness at the criminal trial. The primary difference was the admission of the child's out-of-court statements. As the Washington Supreme Court has recognized, the admissibility of such statements "is crucial to the successful prosecution of many child sex offenses." State v. Jones, 112 Wn.2d 488, 494, 772 P.2d 496, 499 (1989).

The purpose of the expert's testimony was to explain inconsistencies between the child's testimony and her out-of-court statements. The child testified that petitioner had rubbed her private parts. In contrast, some of the out-of-court statements indicated that petitioner put his finger inside her. Since the State did not introduce

testimony concerning these statements at the dependency hearing,[3] there was little reason to offer expert testimony to explain the inconsistency.

Petitioner also claims that Washington courts would have applied collateral estoppel in a subsequent civil proceeding against him. He does not cite any authority for this claim, and it does not appear to be correct. In its decision in this case, the Washington Court of Appeals used exactly the same test for collateral estoppel as it would use in a civil case. Compare State v. Cleveland, 58 Wn. App. 634, 639, 794 P.2d 546, 549 (1990) (appendix to Petition at

---

[3] In cross-examining the social worker at the dependency hearing, the mother's attorney did elicit one of the inconsistent statements.

A-5) with Beagles v. Seattle-First Nat'l Bank, 25 Wn. App. 925, 929, 610 P.2d 962, 965 (1980).

The Washington Court of Appeals has consistently held that collateral estoppel will only be applied if the parties in the first proceeding had a full and fair opportunity to litigate the issues. See, e.g., Fahlen v. Mounsey, 46 Wn. App. 45, 50, 728 P.2d 1097, 1100-01 (1986). In the present case, the Court essentially held that, because of the urgency of dependency proceedings, the State does not have a full and fair opportunity to litigate them. There is no reason to think that, if a subsequent civil proceeding were involved, the Court's reasoning would be any different.

Petitioner suggests that the decision in this case is contrary to Lockwood v. Superior Court, 160 Cal. App. 3d 667, 206 Cal. Rptr. 785 (1984). There, the California Court of Appeals held that a finding in a juvenile dependency proceeding bars criminal prosecution based on the same allegations, despite the different purposes of the two proceedings. Id. at 672, 206 Cal. Rptr. at 787-78. In Lockwood, the criminal defendants were parties to the civil case. Thus, Lockwood does not involve non-mutual collateral estoppel.

The continuing validity of Lockwood is also questionable in light of the recent decision by the California Supreme

Court in Lucido v. Superior Court, 51 Cal. 3d 335, 272 Cal. Rptr. 767, 795 P.2d 1223 (1990). Lucido holds that a finding in favor of the defendant in a probation revocation proceeding does not collaterally estop criminal proceedings based on the same allegations. According to the California Supreme Court, "[t]he differences between revocation hearings and criminal trials outweigh whatever adverse effect inconsistent factual determinations would have on the integrity of the judicial system." Id., 272 Cal. Rptr. at 776, 795 P.2d at 1232. Non-criminal proceedings will estop criminal trials "only when compelling public policy considerations outweigh[] the need for determinations of guilt and

innocence to be made in the usual criminal trial setting." Id, 272 Cal. Rptr. at 775, 795 P.2d at 1231. This reasoning suggests that the California Supreme Court would not agree with Lockwood.

In short, the issue in this case is not simply whether collateral estoppel must be applied from civil to criminal cases. The issue is whether non-mutual collateral estoppel must be applied to findings in civil cases, even though it is not applied to findings in criminal cases. This court's analysis in Standefer provides a strong obstacle to application of collateral estoppel under these circumstances.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted this _____ day of February, 1991.

_____

SETH AARON FINE
Deputy Prosecuting Attorney
Snohomish County Prosecutor's Office

Attorney for Respondent